GUAN TEIK SDN BHD

v.

HJ MOHD NOOR HJ YAKOB & ORS

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
NH CHAN JCA
SITI NORMA YAAKOB JCA
[CIVIL APPEAL NO: K-02-152-1996]
3 JULY 2000

LAND LAW: *Sale of Land - Whether sale agreement or moneylending transaction - Findings of trial judge - Whether supported by contemporaneous documents - Whether perverse*

The land in dispute was purchased by the first respondent at an auction. It was initially registered in his name only but on the same day it was transferred to and registered in his name and the names three others in equal shares. The first respondent then entered into a sale and purchase agreement with a company. The company lodged a private caveat on the land after it was revealed that the ownership of the first respondent in the land was only 1/4 share.

The company eventually rescinded the sale and purchase agreement. The first respondent then entered into an agreement with the appellant whereby the appellant gave a sum of money to the first respondent. As security for the loan, all three respondents who owned 3/4 of the land executed blank memoranda of transfers in favour of the appellant. The fourth owner never executed the transfer.

The issue raised in the Court of Appeal was whether the second transaction was a genuine sale of land or one of money lending. The trial judge held that it was a money lending transaction. The appellant appealed.

Held:
Per Siti Norma Yaakob JCA:

[1] Where conflicting evidence is presented, it is the duty of the court not only to weigh such evidence on a balance of probabilities but also to look at all the surrounding factors and to weigh and evaluate the contemporaneous documents that may tend to establish the truth or otherwise of a given fact.

[2] The trial judge erred when he failed to direct his mind to the probative effect of the contemporaneous documents.

[3] From the language of two letters adduced, it was clear that there had been an outright sale of the respondents' shares in the land and that the first respondent had received his share of the purchase price which explained the respondents' conduct in executing the three blank memoranda of transfers. The loan was a separate transaction altogether as seen from the purpose of the loan and the fact that the loan agreement was executed well after the blank memoranda of transfers were signed.

[Appellant's appeal allowed.]

*[**Bahasa Malaysia** Tranlations Of Headnotes]*

Hartanah yang dipersoalkan telah dibeli oleh responden pertama dalam satu lelongan. Pada awalnya, hartanah tersebut didaftarkan dalam namanya sahaja. Akan tetapi pada hari yang sama hartanah tersebut dipindahmilikkan dan didaftarkan kepada beliau dan tiga yang lain dalam bahagian yang sama. Responden pertama kemudiannya memasukki satu perjanjian jualbeli dengan sebuah syarikat. Syarikat tersebut telah memasukkan kaveat persendirian pada hartanah tersebut selepas ia mendapati bahawa milikan responden pertama hanyalah 1/4 bahagian.

Syarikat tersebut akhirnya membatalkan perjanjian jualbeli tersebut. Responden pertama kemudiannya memasukki perjanjian jualbeli dengan perayu dimana perayu telah memberikan sejumlah wang kepada responden pertama. Sebagai jaminan kepada pinjaman tersebut, ketiga-tiga responden yang memiliki 3/4 bahagian hartanah tersebut menyempurnakan memoranda pindahmilik yang kosong memihak kepada perayu. Tuanpunya keempat tidak pernah menyempurnakan pindahmilik.

Isu yang dibangkitkan di Mahkamah Rayuan ialah sama ada transaksi yang kedua adalah penjualan hartanah yang sebenar atau satu transaksi pinjaman wang. Hakim bicara memutuskan bahawa ianya adalah satu transaksi pinjaman wang. Perayu merayu.

Diputuskan:
Oleh Siti Norma Yaacob HMR

[1] Bila mana keterangan yang bercanggah dikemukakan di mahkamah, ianya adalah tugas mahkamah untuk tidak hanya menimbangkan keterangan tersebut pada imbangan kebarangkalian tetapi mahkamah juga mesti melihat kesemua fakta-fakta sekeliling dan menimbang serta menilai dokumen-dokumen semasa yang mungkin akan memantapkan kebenaran atau sebaliknya.

[2] Hakim bicara telah khilaf kerana beliau gagal menumpukan mindanya kepada kesan probatif dokumen-dokumen semasa.

[3] Dari bahasa kedua-dua surat yang dikemukakan, adalah jelas terdapat penjualan bahagian responden-responden dalam hartanah tersebut dan bahawa responden pertama telah menerima bahagian hasil jualannya yang dijelaskan melalui tindakan responden-responden menyempurnakan tiga memorandum pindahmilik yang kosong. Pinjaman tersebut merupakan satu transaksi yang berasingan sama-sekali sebagaimana yang dapat dilihat dari tujuan pinjaman tersebut dan dari fakta yang pinjaman tersebut dipersetujui disempurnakan selepas pindahmilik kosong ditandatangani.

For the appellant - Ghazi Ishak (Edward Andrew with him); M/s Ghazi & Lim
For the respondents - JA Yeoh; M/s Kartar Singh Dhaliwal & Co

[Appeal from High Court, Alor Setar; Civil Suit No:12/1981]

Reported by Yow Ting Fong

JUDGMENT

Siti Norma Yaakob JCA:

The dispute in this appeal is about the dealings and transactions conducted over a piece of land comprised in Grant for Land (Surat Putus) No. 4437, Portion No. 123 in the Mukim of Sungei Pasir, District of Kuala Muda in the State of Kedah containing an area of 138 relongs 458 jembar ("the land"). The registered proprietors of the land are the three respondents before us and one Haji Abdul Latiff bin Talib ("Latiff") in equal undivided shares. Latiff is not a party in these proceedings.

The land was purchased by the first respondent at a public auction on 15 December, 1973, for RM80,000. Since he had successfully bidded at the auction, the land was initially registered in his name as sole proprietor on 6 February 1974, but on the same day the land was transferred and registered in his name and three others as well, they being the second and third respondents and Latiff in equal shares. It is the third respondent's evidence that he paid the first respondent, his brother-in-law RM20,000 for his 1/4 share of the land. The second respondent is the first respondent's wife and Latiff is a good friend. Dealings in the land after this were conducted principally by the first respondent as he represented the other two respondents and Latiff.

On 27 December, 1973, just twelve days after he had successfully bidded for the land and before it was registered in his name, the first respondent entered into a sale and purchase agreement with a company known as United

Enterprise (Kedah) Sdn Bhd ("the company"). Under the agreement, the company agreed to purchase the land from the first respondent for RM208,419.22 subject to the conditions, *inter alia*, that the land was free from all incumbrances, the sale was to be completed within twelve months from 27 December 1973, and with vacant possession. A sum of RM64,525.70 was acknowledged to have been received by the first respondent as deposit and since the amount worked out to be 30% of the purchase price, the Managing Director of the company explained that the first respondent asked for more than the usual 10% deposit as he needed the money to pay off the auction price of the land. That also explains the speed within which he managed to get a buyer for the land soon after he had acquired it.

Then on 27 April 1974, through their managing director, the company lodged a private caveat on the land when a search revealed that the first respondent was no longer the sole proprietor of the land as his share had been diminished to 1/4 only.

The sale of the land to the company did not go through as apart from the fact that the first respondent was not able to transfer the whole of the land in his own name, he was also not able to give vacant possession as the land was occupied by other third parties who claimed to have purchased the land as well. This forced the company to rescind the agreement but it is not clear from the records when that right was exercised. However at para 4 of their statement of claim, the respondents (who were the plaintiffs in the court below) have pleaded that they were notified of the rescission by letter dated 2 January 1975. Unfortunately that letter does not form part of the records but in any event, it is not disputed that with the rescission, the company also demanded the refund of the deposit as well as an unspecified amount of damages which was fixed later at RM5000.00 as costs.

What happened next was the start of the dispute in this appeal. What is not disputed is that the respondent sought the services of a broker, one Wiliam Jansz, who in turn introduced him to the appellant. It is the respondents' case that from the appellant, the first respondent was able to secure a loan of RM90,000. repayable at 18% interest per annum purportedly to make refund of the deposit and the damages demanded by the company. As security for the loan, all three respondents executed blank memoranda of transfers of their undivided 1/4 shares in the land to the appellant. Latiff however did not execute any memorandum of transfer in favour of the appellant as he was in Mecca performing his pilgrimage. However the first respondent undertook to make Latiff sign a memorandum of transfer of his 1/4 share, the moment he returned home. As it turned out, the first respondent was not able to persuade Latiff as the latter never executed any memorandum of transfer in respect of his 1/4 share to the appellant.

The appellant's (defendant in the court below) pleaded version sorrounding the RM90,000 loan is as follows. He had, on 14 February 1976, entered into an oral agreement with the first respondent who also acted on behalf of the other three co-proprietors of the land to purchase the land at the agreed price of RM305,665.00. As evidence of that sale, the appellant had deposited two cheques, one dated 14 February 1976, for RM100,000 and the other dated 17 February 1976, for RM108,400 with the stakeholders, Messrs Albert S Hoe & Co, a firm of solicitors who also acted for both the appellant and the respondents. The deposits were made on the understanding that the two sums of money would only be paid out to the respondents once the land was transferred and registered in the appellant's name. There was also an undertaking given by the first respondent that he would endeavour to get Latiff to execute a memorandum of transfer in respect of Latiff's 1/4 share of the land in favour of the appellant. It was under those circumstances that the respondents executed the three blank memoranda of transfers in favour of the appellant on 17 February 1976, and it was also on that date that the appellant settled the balance of the purchase price by issuing a cash cheque for RM97,265 to the first respondent, receipt of which is denied by the first respondent.

It is also the appellant's case that by 17 February 1976, the purchase price of the land had been paid in full but he could not obtain a transfer of the land into his name as

(1) there was the caveat lodged by the company

(2) Latiff had yet to execute a memorandum of transfer in his favour.

It was to obtain the withdrawal of the company's caveat that the appellant lent the RM90,000 to the first respondent but subject to the following considerations.

(1) That the two payments deposited with the stakeholders be refunded to the appellant.

(2) That the loan of RM90,000 be taken as payment towards the purchase price of the land.

(3) That the RM90,000 be deposited with Messrs Sharma & Co, the respondents' then solicitors.

That was the situation in February 1976 and on 23 May 1976, the appellant lodged a private caveat on the land to protect his interests.

It is not disputed tha the appellant deposited the RM90,000 first with Messrs Sharma & Co and later that same amount was transferred to the account of Messrs Albert S Hoe and Co.

In 1977, the company's new solicitors, Messrs Lim Hunk Aik & Co made a fresh demand for RM138,000 to the respondents as the condition for the rescission. As the respondents were not able to meet that demand, the company instituted Civil Suit No. 52/77 in Alor Setar against the respondents and Latiff for specific performance of the sale and purchase agreement dated 27 December 1973.

That suit was settled on 18 February 1979, together with Originating Summons No. 251/76 filed by Latiff against the company seeking to remove the private caveat lodged by the company. We shall revert to that consent order later on in this judgment.

Another important event that occured in 1979, was the appellant's attempt to register the three blank memoranda of transfers executed by the respondents. His solicitors Messrs Albert S Hoe & Co filled up the blank spaces in the memoranda with full particulars of the sale, dated them 31 January 1979, and in the process the year 1976, the only written word that appeared in the memoranda other than the signatures of the respondents, was rubbed off and substituted with 1979 and initialled and the completed memoranda were then sent to the land office for registration. They were however rejected because of the presence of the company's caveat lodged in April 1974.

Then in 1981, the respondents filed the instant proceedings, Civil Suit No 21/81, leading to this appeal, against the appellant seeking principally:

(1) the removal of the appellant's caveat.

(2) the return of the three memoranda of transfers.

(3) an injunction restraining the appellant from presenting the three memoranda of transfers for registration and

(4) damages.

The respondents have pleaded fraud in relation to the conduct of the appellant in filling up the blank transfer forms and presenting them for registration with the land office. Before us however no submission was made on this plea and the respondents appear to have abandoned it altogether.

At the hearing in the court below, all the three respondents testified and they called as their witness Mr Sharma, the solicator, who acted for the first respondent in CS 52/77. Because of his age and health, the appellant did not

testify and the parties were content to accept his evidence given in another related proceedings in Originating Motion No 23/80.

Before us the only issue raised was whether the transaction entered between the parties was a genuine outright sale of the land or one of money lending. The learned trial judge held that it was a money lending transaction as he accepted the respondents' evidence to be the truth of the whole matter in the light of the conflicting evidence adduced before him. Our task is to determine whether that conclusion has been correctly made.

In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also encumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact. In this instance the learned trial judge discredited the evidence of the appellant, accepted the evidence of the respondents wholeheartedly and disregarded the contemporaneous documents totally. We say that he had erred as he had failed to direct his mind as to the probative effect of the contemporaneous documents. He should, after accepting the respondents' evidence, weighed it against the contemporaneous documents and evaluate whether such documents support the respondents' oral testimony. We say that this evaluation exercise is most crucial for it must be remembered that the respondents were testifying to events that happened eighteen years ago whilst the contemporaneous documents speak of matters then existing at the time such documents, were issued.

Perusing the notes of evidence, it is clear that there is no sale and purchase agreement executed by the parties in respect of the land although there is a loan agreement dated 18 January 1977, pertaining to the RM90,000 loan. Since that loan agreement was executed after the alleged sale, we shall take the events as they occured in point of time.

The evidence shows that on 14 February 1976, Mr Albert Hoe the appellant's solicitor received RM100,000 from the appellant and deposited that amount into the appellant's account in his firm. This is borne out by a receipt No. 3480 dated 14 February 1976, D 22, issued by Messrs Albert S Hoe & Co and the purpose of the payment is clearly stated in D22 to be the "deposit for the purchase of the land comprised in Surat Putus No. 4437, Lot 123, Mukim Sungai Pasir, District of Kuala Muda, Kedah", the subject matter of the dispute before us.

Three days later on 17 February 1976, two further payments were made in respect of the same transaction. The first is evidenced by a second client's account receipt, No. 3485, D23, again issued by Messrs Albert S Hoe & Co

in respect of RM108,400 received from the appellant in payment of part of the balance of the purchase price of the land. It is Mr Albert Hoe's testimony that he was instructed by the appellant to release the two payments totalling RM208,400 to the respondents the moment the land was registered in the appellant's name.

With the two deposits there remained only another RM97,265 before the purchase price of the land was settled in full. Settlement for that sum was made on 17 February 1976, this being the second payment made that day by way of an Overseas Union Bank Limited cash cheque No BW 426904 issued by the appellant and it is his contention that the cash cheque was handed to the first respondent who acknowledged receipt of it by signing on the cheque butt. The cheque has since been cashed but the first respondent denied that he was the beneficiary of the funds.

Mr Albert Ho, the parties' common solicitor who witnessed this last payment testified that since the first respondent had asked for a cash cheque, he had taken the precaution of insisting upon the first respondent acknowledging receipt of the cheque by signing on the cheque butt, and the first respondent has confirmed that the signature on the cheque butt is his.

Further evidence on the payments of the purchase price can also be found in subsequent correspondence between the solicitors of the first respondent and the appellant. Of particular interest is a letter dated 12 July 1976, written by the solicitors for the first respondent and addressed to the solicitors of the appellant and the relevant parts of that letter reads as follows.

> Dear Sirs,
>
> We act for Mohd. Noor bin Haji Yakob.
>
> Our instructions are that one-quarter (1/4) undivided share in land held under S.P. No. 4437, Lot 123 Sungai Pasir, Kuala Muda, has been sold to your client, whose name our client does not know, at a price of approximately $52,104/- or so. We are also instructed that our client executed a bond which was attested by you on his behalf. Our client was not paid any consideration at all but he was promised the said purchase price upon registration of the Transfer.

The appellant's response to the aforesaid letter came in his reply dated 21 July 1976, penned by his solicitors, Messrs Albert S Hoe & Co and, *inter alia*, states as follows.

Dear Sirs,

Land held under S.P. No. 4437, Lot 123, Mukim Sungei Pasir, District Kuala Muda, Kedah

We refer to your letter dated 12th July, 1976 on which we now have our client's instructions.

We are to state that actually three-quarters (3/4) undivided share in the abovementioned land in the names of Mohd. Noor bin Haji Yakub, his wife Che Sopiah binti Omar and Haji Haron bin Omar had been sold to our client, Mr. Lim Oo Guan of Bukit Mertajam, PW at the price of $52,100 for each one-quarter share, although the said Mohd Noor bin Haji Yakub and Hj Haron bin Omar had arranged to sell the whole of the said land to our client, but at the time the owner of the remaining one-quarter undivided share, Haji Abdul Latiff bin Tahir, was away in Mecca, and the Memorandum of Transfers were duly prepared and executed by the said Mohd. Noor bin Haji Yakub, Che Sopiah binti Omar and Hj. Haron bin Omar on 17-2-1976, and both Mohd. Noor bin Haji Yakub and Hj. Haron bin Omar gave the undertaking to bring the said Haji Abdul Latiff bin Tahir to our office to execute the Memorandum of Transfer for the remaining one quarter share in his name as soon as he returned from Mecca.

That immediately upon execution of the above Memorandum of Transfer the sum of $97,265-00 was paid by our client to the said Mohd. Noor bin Haji Yakub *vide* Overseas Union Bank Ltd., Butterworth cash cheque No:426904, being for his and his wife's shares and the balance thereof to be paid upon registration of the said transfers, and a further sum of $50,000-00 was paid to Haji Haron bin Omar in respect of his share, and the balance thereof also to be paid upon registration of the transfer.

Enclosed herewith is a photostat copy of the said cash cheque given by our client to the said Mohd. Noor bin Haji Yakub and the counterfoil thereof with his signature thereon acknowledging receipt thereof, for your reference and to dispel the fantastic allegation that he was not paid any consideration at all for the execution of the transfers, and the said payment was made before our Mr. Albert Hoe.

From the language of the two letters, it is clear that there had been an outright sale of the respondents' shares in the land and that the first respondent had received his share of the purchase price. That explains the respondents' conduct in executing the three blank memoranda of transfers. The transfers were not the security for the loan as we say that the loan is a separate transaction altogether as seen from the purpose of the loan and the fact that the loan agreement was executed well after the blank transfers were signed by the respondents in February 1976.

The loan agreement dated 18 January 1977, is most peculiar in that it is not executed directly by the appellant lender with the first respondent borrower. Instead it is executed by the appellant lender with William Jansz, the borrower, "for the specific purpose of lending the said sum of money to Mohd Nor bin Haji Yakub in order to remove the caveat entered against the land...". The purpose of the loan is most telling as it ties up with the unsuccessful attempt of the appellant to register the land with the land office. In this respect we say nothing more of the conduct of Mr Albert Hoe in filling up and dating the blank transfer forms as it has ceased to be an issue before us. We merely wish to add that such a conduct is most unprofessional and unbecoming of a solicitor.

The matter of the caveat came to a head on 18 February 1979, when the company's Civil Suit No 52/77 was settled together with related proceedings in Originating Summons No 251/76. By a consent order, the company agreed to accept a payment of RM75,000 from the first respondent in settlement of its claim arising from the recission of the sale and purchase agreement dated 27 December, 1973, and another RM10,000 from the appellant for consenting to the order. Both judgment sums have been received by the company and with it the withdrawal of the company's caveat over the land.

There was yet one last matter that we had directed our minds to. This is the appellant's counterclaim which was dismissed with costs by the learned trial judge at the end of the trial on 12 February 1996, when on record there is already a judgment in default of defence on the counterclaim entered against the respondents on 30 August 1986. Since the judgment in default has been regularly obtained, the judges order made ten years later is clearly wrong. In allowing this appeal with costs here and below we also ordered that the judge's order dismissing the counterclaim with costs be set aside as well and the deposit made in this appeal be refunded to the appellant.